IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

SHAMIRA BROOKS on Behalf of Herself and on Behalf of All Others Similarly Situated,	§	
Plaintiff,	§	
v.	§	**NO. 3:14-cv-130**
DIGITAL INTELLIGENCE SYSTEMS, LLC; DIGITAL INTELLIGENCE SYSTEMS CORPORATION; and DISYS SOLUTIONS, INC.,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT

Defendants Digital Intelligence Systems, LLC and Digital Intelligence Systems Corporation[1] ("Defendants") file their Motion to Dismiss Plaintiffs' Original Complaint ("Complaint") under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Plaintiffs' Complaint, including the collective-action allegations therein, is moot following Defendants' Rule 68 offers of judgment to Plaintiffs in full satisfaction of their claims. In the alternative, Defendants move to dismiss Plaintiffs' Complaint for failure to state a claim under Rule 12(b)(6).

[1] DISYS Solutions, Inc. did not employ Plaintiffs at any time, and thus, is an improperly named defendant in this action.

I.
STATEMENT OF FACTS

A. Plaintiffs' Complaint

Plaintiffs Shamira Brooks (Brooks) and Yolanda Benjamin (Benjamin)2 (collectively, "Plaintiffs") worked for Defendants as trainers in Houston, Texas and the surrounding area. Brooks was employed by Defendants beginning June 11, 2012, and Benjamin's employment with Defendants began on September 17, 2012. See Exhibit 1 (Declaration of David Goggin). Therefore, each Plaintiff was employed by Defendants within the time period relevant to this lawsuit under the maximum three-year statute of limitations of the FLSA. 29 U.S.C. ¶ 255(a); see Plaintiffs' Complaint (Dkt. #1). Both Brooks's and Benjamin's employment with Defendants terminated effective April 25, 2014. See Exhibit 1 at ¶¶ 3, 5. According to Plaintiffs, Defendants paid Plaintiffs a fixed hourly rate for all hours worked, but did not pay an additional 1/2 of the hourly rate for hours worked over forty in a workweek. See Plaintiffs' Complaint (Dkt. #1).

Plaintiffs filed their Complaint on April 15, 2014, alleging that Defendants failed to properly pay them overtime under the FLSA and bringing their claims as a collective action on behalf of themselves and others similarly situated. *See* Plaintiffs' Complaint (Dkt. #1). The sole allegation in the Complaint relating to potentially lost wages is Plaintiffs' allegation that Defendants did not pay Plaintiffs overtime for hours worked in excess of 40 hours a week. *Id.* at ¶¶ 32, 34, 44. Plaintiffs seek lost wages, liquidated damages, and attorneys' fees and costs under the FLSA. *Id.* at ¶¶ 70-72.

[2] Yolanda Benjamin is an opt-in Plaintiff in this action after she filed her Notice of Consent with this Court on April 16, 2014. *See* Notice of Consent (Dkt. #3).

B. Defendants' Rule 68 Offer of Judgment

On May 23, 2014, Defendants served written offers of judgment upon Plaintiffs under Rule 68 of the Federal Rules of Civil Procedure. *See* Exhibit 2 (Offers of Judgment). These offers are for the full value of Plaintiffs' claims including unpaid compensation, liquidated damages, and attorney's fees and costs. Defendants' offers were calculated to fully address Plaintiffs' wage claims. Defendants used the beginning dates of Plaintiffs' employment and calculated the value of Plaintiffs' claims based on that date and Plaintiffs' termination dates (from June 11, 2012 to April 25, 2014 for Brooks and from September 17, 2012 to April 25, 2014 for Benjamin). *See* Exhibit 1 at ¶¶ 3-6.

The only specific allegation that Plaintiffs make concerning Defendants' failure to pay them overtime is the claim that they were not properly paid for hours worked in excess of 40 hours a week. *See* Plaintiffs' Complaint (Dkt. #1) at ¶ 44. Accordingly, Defendants calculated the total number of overtime hours reported by Brooks and Benjamin during their employment. *See* Exhibit 1 at ¶¶ 4, 6. Defendants then calculated the value of the overtime premium based on the rates of pay of Plaintiffs (the "half" of time-and-a-half). *See id.* Defendants multiplied the total number of overtime hours reported by Plaintiffs by the value of the overtime premium to calculate the alleged unpaid wages for overtime hours during their employment. *See* 29 U.S.C. § 207(a). The resulting total of allegedly unpaid wages for overtime hours is $25,265.63 for Brooks and $23,505.63 for Benjamin.

Next, Defendants multiplied the amounts offered to Brooks and Benjamin by two to satisfy Plaintiffs' claim that Defendants' alleged wage violations would trigger an award of liquidated damages under the FLSA, resulting in offers equaling $50,531.26 for Brooks and

$47,011.26 for Benjamin. Defendants also offered an award of all reasonable attorney's fees, costs, and interest (if any), to be assessed by the Court.

II.
ARGUMENT

A. Plaintiffs' Claims Should Be Dismissed for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1).

1. The Rule 12(b)(1) Standard

A court may dismiss a complaint for "lack of subject matter jurisdiction." FED. R. CIV. P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when a court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Where, as here, Defendants stage a factual attack on subject matter jurisdiction under Rule 12(b)(1), the Court may consider any of the following: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009) (*rev'd en banc on other grounds*, 608 F.3d 266 (5th Cir. 2010)). "The district court must resolve disputed facts without giving a presumption of truthfulness to the plaintiff's allegations." *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009). Plaintiffs bear the burden to demonstrate that subject matter jurisdiction exists. *Id.*

Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. CONST. art. III § 2; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). When the circumstances of a matter eliminate any actual controversy between the parties after the commencement of a lawsuit, the action is moot. *Ctr. for Individual Freedom v. Caramouche*, 449 F.3d 655, 661 (5th Cir. 2006). "An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). In order to show federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable personal stake in the outcome of the action. *See Camreta* v. *Greene*, 563 U. S. ___, 131 S. Ct. 2020, 2023 (2011). Importantly, "the definitive mootness of a case or controversy . . . ousts the jurisdiction of the federal courts and requires dismissal of the case." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 335 (1980).

2. Plaintiffs' Individual Claims Are Moot Because They Are Fully Satisfied by Defendants' Offers of Judgment.

In this case, Plaintiffs' claims are satisfied by Defendants' offers of judgment, making this action moot. An offer of complete relief – accepted, rejected, or ignored – acts to moot a plaintiff's claim where he no longer retains a personal interest in the lawsuit. *See Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 n.5 (5th Cir. 2008) (*citing Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake."); *Martinez v. Scott*, No. H-10-1619, 2011 U.S. Dist. LEXIS 90630, at *8 (S.D. Tex. Aug. 11, 2011) ("If the plaintiff refuses such an offer, the court loses jurisdiction because the plaintiff would have nothing to gain from continuing to litigate."); *Harrington v. Nat'l Enter. Sys.*, No. 4:08cv422, 2010 U.S. Dist. LEXIS 21296, at *12 (E.D. Tex. Feb. 18, 2010) ("Defendant's] offer of full relief rendered this case moot, even though Plaintiff did not accept the offer.").

Here, Defendants' Rule 68 offers satisfy the full value of Plaintiffs' claims, including unpaid compensation, liquidated damages, attorney's fees, costs, and any interest. Plaintiffs' only claims in this suit are for allegedly unpaid overtime. Plaintiffs' Complaint (Dkt. #1) at ¶¶ 44, 70. Because Defendants' calculation of their Rule 68 offers addresses the entirety of

Plaintiffs' claims for this allegedly unpaid overtime, Plaintiffs bear the burden to prove by a preponderance of the evidence that Defendants' offer is insufficient. *Bank v. Spark Energy Holdings LLC*, No. 4:11-CV-4082, 2013 U.S. Dist. LEXIS 150733, at *9-10 (S.D. Tex. Oct. 18 2013) (noting in the context of a Rule 68 offer of judgment and subsequent motion to dismiss for lack of subject matter jurisdiction that "the party asserting that subject matter jurisdiction exists . . . must bear the burden of proof by a preponderance of the evidence for a 12(b)(1) motion") (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008)). Plaintiffs cannot do so, and accordingly Plaintiffs' individual claims are moot.

3. Plaintiffs' Purported Collective Claims Are Moot.

Like their individual claims, Plaintiffs' collective claims are also mooted by Defendants' offers of judgment. The Fifth Circuit's decision in *Sandoz v. Cingular Wireless LLC* – holding that individual FLSA claims are mooted by sufficient offers of judgment – and the Supreme Court's recent decision in *Genesis HealthCare Corp. et al. v. Symczyk* – holding that collective claims are mooted once all individual claims are mooted in an FLSA action – compel the conclusion that Plaintiffs' collective claims are moot in this case.

As above, the Fifth Circuit has previously stated that when an offer of judgment is made in satisfaction of the claims of all of the Plaintiffs in an FLSA action, there are no longer any live controversies at issue in the case. *See Sandoz*, 553 F.3d at 921 n.5 ("[Plaintiff] cannot represent any other employees until they affirmatively opt in to the collective action . . . when [Defendant] made its offer of judgment, [Plaintiff] represented only herself . . . if our analysis stopped there, [plaintiff's] case would be moot."). However, in *Sandoz* the Fifth Circuit developed an exception to this rule, explaining that collective claims are sufficient to continue the suit even if the individual plaintiff's claims were mooted by an offer of judgment. *Id.* at 919-20.

Specifically, the Fifth Circuit reasoned that such cases should be allowed to continue to the class certification stage, as the claims of additional plaintiffs added at that stage would "relate back" to the filing of the plaintiff's complaint, preventing the action from becoming moot. *See id.*

The Supreme Court, however, unequivocally struck down the "relation back" exception in *Genesis HealthCare Corp. et al. v. Symczyk*, 569 U.S. ___, 133 S. Ct. 1523 (April 16, 2013). Specifically, the Supreme Court held that, "[w]hile the FLSA authorizes an aggrieved employee to bring an action on behalf of himself and 'other employees similarly situated,' the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Id.* at 1529. Accordingly, the lone rationale from *Sandoz* saving collective claims from mootness even if the individual claims of the parties had been satisfied has vanished.

The sum total of the *Sandoz* and *Genesis* decisions has already been recognized in this District. As summarized by Judge Ellison in *Silva v. Tegrity Personal Services*, the Supreme Court's *Genesis* decision "did no favors to FLSA plaintiffs in the Fifth Circuit. The decision left untouched the part of *Sandoz* that plaintiffs do not like and abrogated the part that plaintiffs do like." No. 4:13-cv-860, 2013 U.S. Dist. LEXIS 171465, at *20 (S.D. Tex. Dec. 5, 2013). Specifically, *Genesis* preserves the portion of Sandoz that "dictates that, in the Fifth Circuit, unaccepted Rule 68 offers can moot FLSA claims," while at the same time overruling the "life raft" of the relation-back doctrine that the Fifth Circuit had previously used to preserve collective action claims even when individual claims were mooted.[3] *Id.*

[3] Courts in other jurisdictions have also followed this rationale. In *Bilabo* et al. *v. Brothers Produce* et al., the federal court of the Southern District of Florida granted a defendant's motion to dismiss where the defendant made an offer of judgment to the plaintiff two weeks before four other plaintiffs submitted notices to "opt-in" to the FLSA collective action. No. 13-20535, 2013 U.S. Dist. LEXIS 65812, at *6 (S.D. Fla. May 7, 2013). The Court followed *Genesis* and, quoting *Genesis*, explained that "a potential collective-action ends the moment the 'lone plaintiff's individual claim becomes moot.'" *Id.* The hypothetical possibility that other parties may join at a later time – even

Here, because Plaintiffs' individual claims have been satisfied by Defendants' offers of judgment, under *Sandoz* and *Genesis* Plaintiffs' collective claims are moot as well. As a result, the collective action allegations should be dismissed as a matter of law.

B. In the Alternative, Plaintiffs Have Failed to State a Plausible Claim for Relief Under Rule 12(b)(6).

In the event that the Court exercises subject-matter jurisdiction over this action – which Defendants believe is unwarranted based on the mootness principles discussed above – Defendants argue in the alternative that Plaintiffs have failed to state a plausible claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

1. Legal Standard Under Rule 12(b)(6)

Rule 12(b)(6) provides for dismissal when the plaintiff "fail[s] to state a claim upon which relief can be granted." To survive a motion to dismiss, "a complaint must contain 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). To state a claim to relief that is plausible on its face, the complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). "[A] formulaic recitation of the elements of a cause of action," and "naked assertions" without supporting facts are inadequate. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). Consequently, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions.").

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when they eventually did – did not preserve the court's subject matter jurisdiction over the collective claims. *Id.* The same result is warranted here.

To survive a motion to dismiss, plaintiffs must allege actual facts that "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief," and the complaint should be dismissed. *Id.*

2. Plaintiffs Have Failed to State a Plausible Cause of Action for FLSA Violations.

Recent decisions from the First and Second Circuits and this District hold that, under the FLSA, "more is required of a plaintiff than an 'all purpose pleading template' with allegations providing no factual context and no way for the court to determine that the plaintiff has stated a claim as opposed to repeating the statutory elements of the cause of action." *Coleman v. John Moore Servs.*, No. H-13-2090, 2014 U.S. Dist. LEXIS 1501, at *10 (S.D. Tex. Jan. 7, 2014) (Rosenthal, J.) (discussing *Dejesus v. HF Mgmt. Servs.*, 726 F.3d 85 (2d Cir. 2013) and *Pruell v. Caritas Christi*, 678 F.3d 10 (1st Cir. 2012)). In particular, rote recitations that plaintiffs "regularly worked hours over 40 in a week and were not compensated for such time, including the applicable premium pay," are insufficient to state a claim under *Twombly* and *Iqbal*. *Pruell*, 678 F.3d at 13 (explaining that such allegations are "little more than a paraphrase" of the FLSA, and accordingly are "so threadbare or speculative that they fail to cross 'the line between the conclusory and the factual'") (quoting *Twombly*, 550 U.S. at 557 n.5).

Instead, Plaintiffs are required to show that they suffered an FLSA violation during particular weeks of their employment. Indeed, "there should be sufficient factual allegations in the [Complaint] – rather than a general and conclusory allegation as to the number of hours 'routinely' worked – whereby the Court can reasonably infer that there was indeed one or more particular workweek(s) in which the plaintiff suffered an overtime violation." *Bustillos v.*

Academy Bus, LLC, No. 13 Civ. 565 (AJN), 2014 U.S. Dist. LEXIS 3980, at *12 (S.D.N.Y. Jan. 13, 2014) (emphasis added) (holding that allegation that plaintiff "would regularly work from 60 to 90 hours per week" was insufficient to state a claim) (citing *DeJesus*, 726 F.3d at 87).

Plaintiffs have failed to provide the required detail in their Complaint. Instead, Plaintiffs' Complaint is littered with conclusory allegations that they "work[ed] in excess of 40 hours a week without receiving any overtime compensation" or "were paid straight time for overtime." *See, e.g.,* Plaintiffs' Complaint (Dkt. #1) at ¶¶ *44, 52*. These allegations merely parrot the language of the statute and are plainly insufficient to state a claim with the requisite particularity. *See Coleman*, 2014 U.S. Dist. LEXIS, at *7 (dismissing complaint on the grounds that the plaintiff must do more than simply repeat the elements of an FLSA claim); *see also DeJesus*, 726 F.3d at 87 ("Whatever the precise level of specificity that was required of the complaint, [plaintiff] at least was required to do more than repeat the language of the statute.").

Accordingly, Plaintiffs' Complaint is bereft of facts that would allow Defendants or the Court to determine during which weeks, if any, a violation occurred. These deficiencies warrant dismissal of Plaintiffs' FLSA claims under Rule 12(b)(6). *See Bustillos*, 2014 U.S. Dist. LEXIS 3980, at *12.

III.
CONCLUSION

Plaintiffs' individual claims for monetary recovery have been fully satisfied by Defendants' Rule 68 offers. Accordingly, there is no ongoing case or controversy before the Court. Accordingly, Plaintiffs' entire Complaint, including the Plaintiffs' collective allegations, is moot, and should be dismissed for lack of subject-matter jurisdiction.

Dated May 23, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 23, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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